



EMINENT DOMAIN 66

THE ISSUE

When the U.S. Supreme Court announced its decision last year allowing the City of New London, Connecticut to take Susette Kelo's house for an office park and an upscale residential development, the public—unlike five of the Court's justices—correctly recognized the decision as a frontal assault on private property rights. As a result, Texans and all Americans have virtually no protections against eminent domain abuse based on the U.S. Constitution. Any protections will now have to come from state governments.

State legislatures around the country responded to this situation and began looking for ways to rectify the problem. To their credit, Texas lawmakers were among the first to take action, passing SB 7 in the 2nd Called Special Session. But even they recognized their work as a stopgap measure to improve the situation until a more permanent solution could be found.

However, many local governments are taking advantage of the current freedom to take property and do not want to add any more property rights protections to Texas law. For instance, the Texas Municipal League put out the statement, "The Kelo decision is good for Texas cities. . . . It simply confirms what cities have known all along: under the Fifth Amendment to the U.S. Constitution, economic development can be as much a 'public use' as a road, bridge, or water tower."

While *Kelo* is only the latest advance in the evolutionary erosion of property rights, it represents a significant change from prior law. The public reaction to *Kelo* spurred the Texas Legislature's initial efforts to address this problem in SB 7. But the Legislature still has much to do to rein in the many local governments that are content to exercise their new freedom to take the property of their citizens.

THE FACTS

- ★ Even before *Kelo*, Texas courts had allowed a steady erosion of the protections against eminent domain abuse, adopting a rather liberal view as to what is or is not a "public use" and allowing the taking of a property in a blighted area constituted a public use, even if the property itself was not blighted.
- ★ The *Kelo* decision represents a real erosion of property rights in Texas because prior to *Kelo*, property owners could look to the U.S. Constitution for protections that Texas courts had eliminated from the Texas Constitution. They can no longer do so.
- ★ The restoration of these rights cannot be guaranteed to last unless they are put into the Texas Constitution.



RECOMMENDATIONS

- ★ Allow all determinations of public use and public necessity by condemners to be freely reviewable by the courts.
- ★ Require governments/entities to use the property only for the stated purpose for which it was condemned. If the property is not used for its original purpose in a timely manner, it should be offered back to the original owner at the original price paid.
- ★ Prohibit eminent domain from being used to acquire any property that will be subsequently transferred to a private party, unless the property in question is itself blighted, and the property owner receives market-based compensation, i.e., compensation based on the new use of the property.
- ★ Define public use: "Public use means that the state or a political subdivision of the state must own, or the citizens of the state as a whole must have the legal right to use, any taken, damaged or destroyed property, and does not mean public purpose or benefit."
- ★ Consider replacing the term "economic development" with "commercial purposes" and revisiting the need for all of the exemptions in the current law.

RESOURCES

- *Eminent Domain Legislation Passed by Other States* by Bill Peacock, Texas Public Policy Foundation (Apr. 2006) <http://www.texaspolicy.com/pdf/2006-04-statelegislation-bp.pdf>.
- *Recent Examples of Eminent Domain Abuse in Texas* by Bill Peacock, Texas Public Policy Foundation (Apr. 2006) <http://www.texaspolicy.com/pdf/2006-04-ED%20examples-bp.pdf>.
- *Protecting Private Property Ownership from Eminent Domain Abuse* by Bill Peacock, Texas Public Policy Foundation (Apr. 2006) <http://www.texaspolicy.com/pdf/2006-04-testimony-facts-bp.pdf>.
- *Protecting Private Property Rights in Texas After Kelo* by Bill Peacock, Texas Public Policy Foundation (Nov. 2005) <http://www.texaspolicy.com/pdf/2005-11-08-pp-kelo.pdf>.
- *Testimony On Takings Of Private Property* by Bill Peacock, Texas Public Policy Foundation (July 2005) <http://www.texaspolicy.com/pdf/2005-07-06-BP-senate.pdf>.
- *Kelo v. City of New London: What it Means and the Need for Real Eminent Domain Reform* Institute for Justice (Sep. 2005) http://www.castlecoalition.org/pdf/Kelo-White_Paper.pdf.
- *Kelo et al. v. City Of New London et al.*, dissent by Justice O'Connor (July 2005) <http://www.law.cornell.edu/supct/pdf/04-108P.ZD>.
- *Kelo et al. v. City Of New London et al.*, dissent by Justice Thomas (July 2005) <http://www.law.cornell.edu/supct/pdf/04-108P.ZD1>.